

P-443/EM-89-305 ORDER DENYING PETITIONS FOR RECONSIDERATION

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Tariff Filing
by MCI to Provide Operator
Assisted Calling to its Dial
"1", Prism III and Prism Plus
Customers, and to Introduce
Payphone Service, Institutional
Phone Service, and the LEC
Calling Card Service

ISSUE DATE: August 9, 1991

DOCKET NO. P-443/EM-89-305

ORDER DENYING PETITIONS FOR
RECONSIDERATION

PROCEDURAL HISTORY

On February 26, 1991, the Commission issued its ORDER REJECTING
REFUND PLAN AND REQUIRING FURTHER FILINGS in this matter.

On March 18, 1991, MCI Communications, Inc. (MCI) and the
Department of Public Service (the Department) filed petitions for
reconsideration of the Commission's February 26, 1991 Order.

On June 25, 1991, the Commission met to consider this matter.

FINDINGS AND CONCLUSIONS

In its August 16, 1990 Order in this matter, the Commission found
that MCI must refund the total amount of revenues it collected
from the provision of operator services to locations serving
captive customers (OSCC)¹ before receiving authority from the

¹ The service that is the subject of this Order has been
referred to as alternative operator service (AOS). However, as
the Commission has previously noted, a phrase which more
accurately identifies the source of the Commission's concern and
therefore the basis for the special treatment it gives to all
providers of such a service is Operator Services for Captive
Customers (OSCC). Because of the vulnerable nature of the
captive end-user and the as yet undetermined public interest
value of this service, the Commission imposes special conditions
on its provision, including the requirement that a company

Commission to do so. In its February 26, 1991 Order, the Commission specified the dates that corresponded to such a refund period.

In their petitions for reconsideration of the Commission's February 26, 1991 Order, MCI and the Department disputed the end date chosen by the Commission for the refund period. The petitioners asserted that the Commission erred in establishing August 15, 1991 as the end date.

The petitioners argued that the Commission granted MCI broad authority in 1985 to offer telecommunications services in Minnesota, including the authority to provide any new service covered under Minn. Stat. § 237.63, subd. 4 (b) (1990). According to the parties, since MCI had authority to offer operator service to locations that serve transient or "captive" customers (OSCC) since 1985, the only things it needed to do to legalize its offering of this service was to file a tariff for this service and, since it was a "new" service, wait 10 days as required by Minn. Stat. § 237.63, subd. 4 (b) (1990). The petitioners asserted that the refund period end date should be June 15, 1990, a date which, although it was later than the legally prescribed waiting period, had been requested by MCI in its May 15, 1990 tariff filing.

A. Requests to Reconsider Extent of Refund Period Are Untimely

The decision contested by the parties in their petitions for reconsideration is the Commission's decision to require MCI to refund revenues it received from providing OSCC prior to receiving Commission authority to do so. This decision was made by the Commission in its August 16, 1990 Order, the same Order that granted MCI interim authority to provide OSCC. Minn. Rules, part 7830.4100 requires parties to file petitions for reconsideration within 20 days of the date the decision is mailed. The time for requesting reconsideration of the Commission's August 16, 1990 Order has expired. Hence, the parties' petitions for reconsideration are untimely.

1. MCI's Petition is Untimely

MCI noted that the August 16, 1990 Order did not state the date that the refund period ended. MCI stated: "There is no reference to the effective cutoff date of the refund period in the Commission's August 16, 1990 Order." Therefore, according to MCI, the August 16, 1990 Order gave no refund period decision for MCI to ask the Commission to reconsider. According to MCI, since it had no recourse to petition the Commission for reconsideration

wishing to provide such service must obtain a grant of interim authority from the Commission prior to providing OSCC.

of the refund period question until the Commission's February 26, 1991 Order specified an end-date for the refund period, its petition for reconsideration of the Commission's February 26, 1991 Order regarding the refund period was timely.

The Commission disagrees. While the August 16, 1990 Order does not state the date that the refund period ended, it clearly adopts the formula by which that date is calculated. The Commission specified that MCI's offense was "...providing operator services from transient locations without Commission authorization" and expressed the formula that would govern the duration of the refund period. The Commission decided that MCI would be required to refund charges collected prior to "Commission authorization." ORDER GRANTING PERMANENT AUTHORITY FOR CERTAIN OPERATOR SERVICES, GRANTING INTERIM AUTHORITY FOR CERTAIN OPERATOR SERVICES, AND REQUIRING REFUND PLAN, Docket No. P-443/EM-89-305 (August 16, 1990). This clear delineation of the refund period was a Commission decision that was subject to a petition for reconsideration within 20 days of the date of the Order.

It appears that MCI now disagrees with the Commission's decision on that issue and feels that the refund period should not extend to the date that the Commission granted MCI authority to offer the service, but should end on a date agreed upon between itself and the Department as the "effective" date of the proposed service, June 15, 1991. The time for raising that disagreement has passed. If MCI disagreed with the Commission's August 16, 1990 decision regarding the extent of the refund period, it had the right to seek Commission reconsideration as authorized and within the time limits established in Minn. Rules, part 7830.4100.

Finally, specification in the February 26, 1991 Order of the actual date that meets the formula adopted in the August 16, 1990 Order (i.e. August 15, 1990, the date "prior to Commission authorization") does not authorize MCI to ask the Commission to reconsider the refund period formula that it adopted in the August 16, 1990 Order. The formula governing the refund period having been adopted in the August 16, 1990 Order, the only question regarding the end of the refund period that MCI could have asked the Commission to reconsider following the February 26, 1991 Order was whether the date enunciated in the February 26, 1991 Order met the formula adopted in the August 16, 1990 Order, i.e. whether August 15, 1990 was the day "prior to Commission authorization."

2. The Department's Petition is Untimely

The Department's October 31, 1990 Report and Recommendation regarding MCI's refund proposal clearly shows that the Department

understood that the August 16, 1990 Order required refunds not simply until June 15, 1990 but until the Commission granted MCI authority to provide OSCC, i.e. through August 15, 1990. The Department summarized the August 16, 1990 Order as follows:

In its August 16, 1990 Order, the Commission....found that MCI had been providing intrastate operator services from transient locations without Commission authorization and required MCI to provide refunds for revenues earned without authorization. Report of Investigation and Recommendation, Docket No. P-443/EM-89-305 (October 31, 1990) at page 1. [Emphasis added.]

Obviously, such a decision was subject to a timely request for reconsideration for only 20 days, pursuant to Minn. Rules, part 7830.4100 and the Department's March 1991 request for reconsideration of that decision was untimely.

However, in its Petition for Reconsideration filed March 18, 1991, the Department altered its characterization of the August 16, 1990 Order, and incorrectly asserted that the Order set the end date for refunds at the date MCI stopped providing these services. Based on this incorrect characterization, the Department argued that, since MCI did not stop providing these services at any time during the proceeding, the Commission's selected end date did not materialize. According to the Department's Petition, since the Commission's end date did not materialize, the end date question reemerged and the Commission's decision on that question in its February 26, 1991 Order is the subject of this timely request for reconsideration.

The Department's mischaracterization of the end date decision made by the Commission in its August 16, 1990 Order is fatal to the Department's argument. In fact, as the Department correctly acknowledged in its October 1990 Report and Recommendation, the August 16, 1990 Order decided that the refund period would end once MCI received authority from the Commission to provide the service in question. As indicated earlier, the Department's request in March 1991 for reconsideration of that decision was untimely.

B. MCI Had No Authority to Provide OSCC Before August 16, 1990

Assuming MCI and the Department had timely petitioned for reconsideration of the Commission's determination of the duration of the refund period, their argument that the refund period should end on June 15, 1990 is without merit.

MCI argued that as a full service interexchange carrier it was authorized by Minn. Stat. § 237.63, subd. 4 (b) (1990) to offer any new service, including operator services to captive customers (OSCC), within ten days after filing. According to MCI, since it

completed its OSCC tariff filing on May 17, 1990, it would have been authorized by law to provide this service on May 27, 1990 (10 days after completing its tariff filing) but since its filing requested that its OSCC tariff become effective on June 15, 1990, its new service should be recognized as "effective" as of that date, which should also serve, therefore, as the end date of the refund period. The Department makes the same argument.

1. The Department's Changing View of MCI's Authority

Until oral argument prior to the Commission's February 26, 1991 Order, the Department shared the Commission's view that MCI needed specific authority from the Commission prior to offering OSCC. The Department had consistently recommended that the Commission require MCI to refund revenues earned "prior to Commission approval." Department Report of Investigation and Recommendation, Docket No. P-443/EM-89-305 (May 29, 1990) at page 3. In its June 13, 1990 Supplemental Report on MCI's response to the Department's May 29, 1990 recommendations, the Department reiterated its recommendation that MCI be required to refund all revenues earned prior to Commission approval. Likewise, in its Report of Investigation and Recommendation, Docket No. P-443/EM-89-305 (October 31, 1990) at page 2 the Department stated:

The Department believes that the company was aware that it was providing the service without authority from the Commission and that the company should refund the total revenue earned prior to authorization. [Emphasis added.]

2. MCI's Changing View of its Authority

Likewise MCI, on several occasions in this docket, expressed the view that it now disputes, i.e. that it needed Commission authorization prior to offering OSCC.

* In a May 30, 1989 letter to the Department, MCI agreed that its offering OSCC would not become effective "until the Commission issues an Order."

* In comments filed June 5, 1990 in response to the Department's May 31, 1990 Report and Recommendation, MCI responded to the Department's recommendation that MCI be ordered to refund revenues earned prior to Commission approval. MCI did not dispute that it lacked authority from the Commission to offer OSCC, but instead argued that, when the Commission granted it authority to provide OSCC, the Commission should grant it permanent rather than temporary authority to do so, so that its

authority would be "identical to the type of authority the Commission has given to AT&T."

Also, MCI did not assert that the Department had misstated the refund period and that the period should end on June 15, 1990. Instead, MCI argued that no refund should be ordered at all. In explaining what it perceived to be the inequity of a refund order, MCI complained:

AT&T has, of course, been offering these services with Commission authority during the same time period at which MCI's request to offer the services was pending. (Emphasis added.)

In so arguing, of course, MCI simply was acknowledging what it now denies, i.e. that unlike AT&T it did not have authority from the Commission to offer OSCC and would not have such authority prior to the Commission granting its request.

* In its September 14, 1990 proposed refund plan, MCI did not state what end date for the refund period it was using. It did not suggest that the end date should be June 15, 1990 rather than the date "prior to Commission authorization", the date clearly required by the Commission's August 16, 1990 Order. On the face of it, therefore, MCI's refund plan appeared to use a refund period ending August 15, 1990. Furthering this impression is the fact that, as noted earlier, it did not seek reconsideration of the Commission's August 16, 1990 Order that established that formula for determining the end date for the refund period.²

3. Commission's View of MCI's Authority

The heart of the petitioners's argument is the proposition that the authority MCI received when the Commission granted it a certificate of public convenience and necessity to provide "intraLATA and interLATA telecommunications services to customers within Minnesota...." in 1985 included the authority to provide OSCC to captive customers. This is the same argument that the Commission has previously heard from Teleconnect and rejected.³ In a petition to the Commission dated May 7, 1990, Teleconnect asserted that its certificate of authority to provide

² The Department clearly read MCI's refund plan this way. In its October 31, 1990 Report and Recommendation regarding MCI's refund plan, the Department assumed that MCI was using the end date prescribed in the August 16, 1990 Order. The Department stated: "...the company expects to refund income earned prior to Commission authorization in about three months." (Emphasis added.)

³ In the Matter of the Applications for Authority to Provide Alternate Operator Services in Minnesota, Docket No. P-999/CI-88-917, ORDER DENYING PETITIONS (September 5, 1990).

interexchange telephone services in the State of Minnesota gave it authority to provide OSCC. Teleconnect asserted, as does MCI, that it was not like other companies that provided OSCC but was instead like AT&T, i.e. having full authority to provide OSCC without having to secure specific authority to do so. The Commission dismissed Teleconnect's assertion and stated

The Commission reaffirms the process that it announced in its December 16, 1988 Order [Docket No. P-999/CI-88-917]. First, the Commission will determine whether it is in the public interest to allow companies other than AT&T to provide [OSCC]. In the Matter of the Applications for Authority to Provide Alternate Operator Services in Minnesota, Docket No. P-999/CI-88-917, ORDER DENYING PETITIONS (September 5, 1990) at page 10.

From the commencement of the OSCC Generic Docket⁴, the Commission has viewed all companies except AT&T as needing a specific grant of authority from the Commission prior to providing OSCC. The Commission's cautious approach to OSCC reflects its understanding that the end-users of the service are not the OSCC provider's customers, its concern to protect the end-users of this service, and the fact that it has not been established that OSCC serves the public interest.

Neither the Department nor MCI have presented arguments, precedents or analysis to persuade the Commission to depart from its historic treatment of non-AT&T companies with respect to the provision of OSCC. Therefore, the Commission finds no reason to alter its decision that the end date for MCI's refund period is the last day that MCI did not have authority from the Commission to offer OSCC.

CONCLUSION

Based on the foregoing analysis, the Commission will deny the Department's and MCI's petitions for reconsideration of the Commission's February 26, 1991 Order. MCI's plan to refund the full amount it collected for providing OSCC between March 1, 1989 and August 15, 1990 will be accepted. MCI will be required to begin the refund no later than 30 days following the date of this

⁴ In the Matter of the Applications for Authority to Provide Alternate Operator Services in Minnesota, Docket No. P-999/CI-88-917), ORDER ACCEPTING WITHDRAWAL OF PETITION, CONSOLIDATING DOCKETS AND NOTICE AND ORDER FOR HEARING, (December 16, 1988).

Order and make a compliance filing within 30 days after completing the refund.

ORDER

1. MCI's petition for reconsideration of the Commission's February 26, 1991 Order in this matter is denied.
2. The Department of Public Service's petition for reconsideration of the Commission's February 26, 1991 Order in this matter is denied.
3. MCI's plan to refund the full amount it collected for providing OSCC between March 1, 1989 and August 15, 1990 is accepted.
4. MCI shall begin the refund no later than 30 days following the date of this Order and complete the refund within twelve (12) months from the date that the tariff providing the refund through reduced rates goes into effect.
5. Ten (10) days prior to the completion of the refund, MCI shall file a revised tariff that would reflect MCI's normal rates for operator services for captive customers.
5. Within 30 days after completing the refund, MCI shall file a refund compliance report with the Commission.
6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Richard R. Lancaster
Executive Secretary

(S E A L)